U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

August 22, 2008

Dear Chief State Election Official,

Over the past several months, we at the Election Assistance Commission have been working to keep you apprised of the status of the $115 million in requirements payments appropriated by Congress in 2008. In June, at the National Association of State Election Director's conference, the states were informed that Congress' appropriation was for a single year, but that EAC was working to obligate those funds to preserve them for the states' use beyond the close of the 2008 fiscal year.

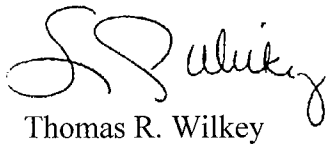
I am writing today to inform you that even though EAC successfully obligated these funds in the same way we did with the 2003 and 2004 requirements payments, our actions have now been questioned by the Government Accountability Office (GAO). We feel it is our responsibility to inform you of the potential ramifications of GAO's questions and to apprise you of the efforts that EAC has taken and will continue to take to protect these funds for the states.

In June, EAC addressed the potential problem concerning the one-year funds, by obligating the funds according to the formula set forth in the Help America Vote Act (HAVA) and in accordance with federal law governing the obligation of formula grant funds. GAO has questioned whether HAVA requirements payments are a formula grant or discretionary grant, in light of the fact that states must also submit a state plan, make certain certifications and appropriate matching funds prior to receiving the requirements payments. EAC's Inspector General recently requested a formal opinion from GAO regarding this issue. We expect GAO to offer its opinion at the end of September. In the meantime, EAC has informed the Office of Legal Counsel at the Department of Justice about this pending GAO opinion request and our concern regarding its possible impact on EAC and other federal agencies. The letter to the Department of Justice provides additional details and is attached for your review. Should EAC receive an adverse opinion from GAO, EAC will request a formal opinion from the Office of Legal Counsel regarding this issue.

While EAC believes that its obligation of these funds is correct, it is important to understand the ramifications of a finding that HAVA requirements payments are not formula grants. If such a decision were made, EAC could not distribute funds from the $115 million appropriation after September 30, 2008, without violating the Anti-deficiency Act, which precludes federal government agencies from spending more money than they have available. Also, such a decision would call into question previously distributed HAVA requirements payments that were appropriated as one-year funds.

EAC will continue to work with GAO and the Department of Justice to resolve this matter, and we will keep you informed of our progress. In the meantime, please review the attached letter for more information about this important issue. If you have questions regarding this letter or the status of the requirements payments, please contact me at 202-566-3100 or twilkey@eac.gov.

Sincerely,



Thomas R. Wilkey
Executive Director

Attachment: EAC Letter to Department of Justice, Office of Legal Counsel

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

August 21, 2008

Steven Bradbury
Principal Deputy Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Bradbury,

The purpose of this letter is to inform your office of an issue that may substantially impact executive branch operations in the area of Federal financial assistance. The issue is whether grants allocated by statutory formula are obligated by operation of law pursuant to 31 U.S.C. §1501(a)(5)(A)[1] when the applicable statute also requires the grantee to set aside matching funds, make certifications, and provide and publish a state plan. The Government Accountability Office (GAO) is presently considering this issue in the context of a U.S. Election Assistance Commission's (EAC) Help America Vote Act (HAVA) grant program. A determination by GAO that 31 U.S.C. §1501(a)(5)(A) does not apply to formula grant programs like those in HAVA will result in a substantial departure from the current common understanding of formula grant administration. Such an interpretation also may impact prior grant awards and significantly alter how executive agencies distribute formula grants in the future. At a minimum, such a decision would likely require the EAC to recoup hundreds of millions of dollars in funding previously granted to states.

The EAC is an independent executive agency created by HAVA. As part of its duties under HAVA, EAC is responsible for the administration of financial aid to states in the form of "requirements payments." HAVA specifies that EAC's requirements payments be allotted pursuant to a specific formula based on the proportion of a state's voting age population. Prior to receipt of the Federal payments, states must certify to EAC that they have complied with HAVA requirements for a state plan, which includes a provision for the appropriation of State matching funds, and that the state will comply with applicable Federal laws.

Since the EAC's inception, Congress has appropriated funds for requirements payments several times. In fiscal year 2008, the EAC received $115 million in requirements payments funding (Consolidated Appropriations Act of 2008 (P.L. 110-161)). Under this appropriation, the requirements payments are one-year funds and must be obligated by September 30, 2008. The EAC has, in fact, obligated this year's appropriation consistent with HAVA's formula and the authority of 31 U.S.C. §1501(a)(5)(A). This statute (31 U.S.C. §1501 (a)(5)(A)) states that grant funding can be recorded as obligated simply when the amount to be paid is prescribed by statute. The obligation statute contains no other requirements, nor does it suggest that the existence of other statutory requirements (such as state plans, matching funds or certifications) render it inapplicable. The EAC has historically treated requirements payments as non-discretionary formula grants and has never entered into grant agreements with states to obligate funds or issue payments. Accordingly, the EAC has treated this year's requirements payments as obligated by operation of law, and plans to distribute them to states after the close of fiscal year 2008.[2]

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[1] 31 U.S.C. §1501 (a)(5)(A) provides that grants payable "from appropriations made for payment of, or contributions to, amounts required to be paid... under formulas prescribed by law..." shall be recorded as an obligation of the United States.

[2] HAVA allows state grantees to use requirements payments without fiscal year limitation (42 U.S.C. §15401(e)).

On July 15, 2008, the EAC Inspector General (IG) met with representatives from the Government Accountability Office (GAO) and Commission staff to discuss EAC actions with respect to its 2008 requirements payments appropriation. At this meeting, the IG and EAC staff informed GAO that EAC had recorded these funds as an obligation pursuant 31 U.S.C. §1501(a)(5)(A). At the meeting, the GAO representatives suggested that HAVA requirements payments may not qualify as formula grants within the meaning of 31 U.S.C. §1501 (a)(5)(A). Specifically, GAO representatives raised concerns that the grant's matching funds, certification, and state plan provisions may render HAVA's allocation formula discretionary or otherwise outside the scope of 31 U.S.C. §1501 (a)(5)(A). Following this conversation, the EAC IG requested a formal opinion from GAO. The EAC's Office of General Counsel provided the IG a memorandum (attached), supporting the agency's position that requirements payments obligate by operation of law. The IG forwarded this document to GAO.

The EAC believes its treatment of grant funds as obligated by operation of law (31 U.S.C. §1501 (a)(5)(A)) is consistent with the understanding and practices of other Federal grantor agencies. Congress commonly appropriates funds for grant programs that have the characteristics of HAVA's requirements payments, including matching fund, state plan and certification requirements. After initial inquiries with other executive agencies, it is EAC's understanding that it is common practice to record obligations based solely on a statutory formula, notwithstanding any additional statutory requirements for certifications, matching funds or state plans.

The EAC is concerned that GAO may return a decision that is contrary to the currently accepted understanding and application of 31 U.S.C. §1501 (a)(5)(A). EAC believes that such a finding would be inconsistent with both the plain meaning of the statute and the manner in which it has been applied throughout the Federal government. In all GAO opinions EAC has surveyed regarding the obligation of formula grants, GAO did not considered additional statutory requirements (like state plans, matching funds or certifications) relevant to their 31 U.S.C. §1501 (a)(5)(A) determination, even where such requirements clearly existed within the grant program. Should GAO hold that HAVA's requirements payments are not formula grants under 31 U.S.C. §1501 (a)(5)(A), EAC may be required to recoup hundreds of millions of dollars in HAVA funding it has already distributed. In addition, such a finding could have significant consequences for other executive branch agencies.

The EAC will continue to update your office on this issue. Please feel free to contact me at twilkey@eac.gov or (202) 566-3100 should you have any questions or need further information.

Sincerely,

Thomas R. Wilkey
Executive Director

Attachment

cc: Lauren Larson, Office of Management and Budget

U.S. ELECTION ASSISTANCE COMMISSION
1225 New York Ave. NW – Suite 1100
Washington, DC 20005

July 22, 2008

MEMORANDUM

TO: Curtis Crider, Inspector General

CC: Thomas Wilkey, Executive Director
Alice Miller, Chief Operating Officer
Edgardo Cortes, Director of Election Administration Support
Diana Scott, Director of Administration

FROM: Office of the General Counsel

SUBJECT: 2008 Requirements Payments Appropriation

On July 15, 2008, the U.S. Election Assistance Commission (EAC) Inspector General (IG) met with representatives from the Government Accountability Office (GAO) to discuss EAC actions with respect to its recent 2008 Requirements Payments appropriation. Members of EAC staff, including individuals from the EAC General Counsel's Office and the Election Administration Support Division, were present. At this meeting, the IG informed GAO that EAC had recorded these funds as an obligation pursuant 31 U.S.C. §1501(a)(5)(A), which provides that grants payable "from appropriations made for payment of, or contributions to, amounts required to be paid... under formulas prescribed by law..." shall be recorded as an obligation of the United States. At the meeting, the GAO representatives concurred with EAC's conclusion that grants allocated by formula are obligated by operation of law. However, GAO questioned whether Help America Vote Act (HAVA) Requirements Payments were in fact formula grants within the meaning of 31 U.S.C. §1501 (a)(5)(A). Specifically, GAO representatives raised concerns that the grant's matching funds, certification and state plan provisions may render HAVA's allocation formula discretionary or otherwise outside the scope of 31 U.S.C. §1501 (a)(5)(A). The GAO representative believed that this issue represented a matter of first impression for the Comptroller General and recommended that the IG request a formal opinion.

The EAC disagrees that this is a matter of first impression for GAO and holds that HAVA Requirements Payments are non-discretionary formula grants within the meaning of 31 U.S.C. §1501 (a)(5)(A). This is consistent with the plain meaning of the statute, which recognizes grant funding as obligated by operation of law simply when the amount to be paid is prescribed by statute. The statute contains no other requirements, nor does it

suggest that the existence of other statutory requirements (such as state plans, matching funds or certifications) render it inapplicable. This plain language reading is consistent with GAO opinions. In all cases EAC has surveyed regarding the obligation of formula grants, GAO has never considered additional statutory requirements (like state plans, matching funds or certifications) relevant to their 31 U.S.C. §1501 (a)(5)(A) determination, even where such requirements clearly existed within the grant program. In addition, this reading is one commonly adopted by Federal agencies.

I. Requirements Payments. Pursuant to the Consolidated Appropriations Act of 2008 (P.L. 110-161), the EAC received "$115,000,000 which shall be available for requirements payments under part 1 of subtitle D of title II of [the Help America Vote Act]." This part of HAVA, titled "Requirements Payments," mandates that the EAC make payments to states for them to meet the requirements of Title III of HAVA and otherwise improve the administration of Federal elections. (42 U.S.C. §15401(a)). Per HAVA, Requirements Payments are allocated on the basis of a detailed formula. This formula is based upon each state's voting age population as a function of the voting age population of all states (as reported in the most recent decennial census).[1] (42 U.S.C. §15402). The formula also sets a minimum amount due states, the District of Columbia and the various territories. (42 U.S.C. §15402(c) and (d)). Finally, HAVA requires states to make a certification prior to receipt of Requirements Payments. (42 U.S.C. §15403). Specifically, states must certify that they have submitted a state plan meeting the requirements of 42 U.S.C. §15404; will meet certain statutory obligations including HAVA's administrative complaint procedures (42 U.S.C. §15512) and other applicable Federal election statutes specified at 42 U.S.C. §15545; and that they have appropriated a 5% state match of the Federal funds due under the allocation formula. (42 U.S.C. §15403). The EAC has historically treated Requirements Payments as non-discretionary formula grants. The agency has never entered into grant agreements with states in order to obligate or issue the funding. In addition, the EAC has issued payment based solely upon the states' certifications, subject only to EAC audit (42 U.S.C. §15403).

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[1] The Requirements Payments allocation formula (42 U.S.C. §15402) reads as follows:

a. In General.--Subject to subsection (c), the amount of a requirements payment made to a State for a year shall be equal to the product of--

1. the total amount appropriated for requirements payments for the year pursuant to the authorization under section 257; and
2. the State allocation percentage for the State (as determined under subsection (b)).

b. State Allocation Percentage Defined.--The ``State allocation percentage" for a State is the amount (expressed as a percentage) equal to the quotient of--

1. the voting age population of the State (as reported in the most recent decennial census); and
2. the total voting age population of all States (as reported in the most recent decennial census).

c. Minimum Amount of Payment.--The amount of a requirements payment made to a State for a year may not be less than--

1. in the case of any of the several States or the District of Columbia, one-half of 1 percent of the total amount appropriated for requirements payments for the year under section 257; or
2. in the case of the Commonwealth of Puerto Rico, Guam, American Samoa, or the United States Virgin Islands, one-tenth of 1 percent of such total amount.

d. Pro Rata Reductions.--The Administrator shall make such pro rata reductions to the allocations determined under subsection (a) as are necessary to comply with the requirements of subsection (c)....

II. The Plain Language of 31 U.S.C. §1501 (a)(5)(A) Obligates Grant Funding by Operation of Law on the Sole Basis that the Amount to be Allocated is Prescribed by Statute. A plain language analysis of 31 U.S.C. §1501 (a)(5)(A) supports EAC's determination that the provision applies to HAVA requirements payments, as the provision provides that grants payable in amounts prescribed by statute are obligated by operation of law.[2] The statute reads as follows:

> (a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—
> ....(5) a grant or subsidy payable— (A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law...
>
> 31 U.S.C. §1501 (a)(5)(A)

Based upon a plain language reading of 31 U.S.C. §1501 (a)(5)(A), grant funding may be obligated when the amounts to be paid are prescribed by Congress. To obligate funding under this provision, an agency need only demonstrate that the "amount" of such funding is "required to be paid... under formulas prescribed by law." Simply put, the requirements of 31 U.S.C. §1501 (a)(5)(A) are fulfilled when a grant is payable pursuant to a statutory formula. No other requirements are noted.

This plain language reading of the statute is consistent with its underlying principle: The authority which controls the amount of funds payable must also serve as the obligation authority. In other words, if a statute sets the amount to be paid a grantee, it is the statute that serves as the obligation authority, as the administering agency has no discretion or authority to alter what Congress has required. This concept was first recognized in dealing with agencies that had distributed funds in a manner inconsistent with statutory formulae. In these cases, GAO determined that as long as there existed a statutory formula prescribing the distribution of funds, that statutory language controlled, the agency action or agreements were moot, and the agency was required to amend its distribution consistent with statute. (41 Comp. Gen. 16 (1961) and B-164031(3).150 (Sept 5, 1979)). Thus, as GAO notes in its Red Book, the reason grant payments allocated by statutory formula are obligated by operation of law is that the congressional mandate supersedes agency action.

> Where an agency is required to allocate funds to states on the basis of a statutory formula, the formula establishes the obligation to each recipient rather than the agency allocation **since, if the allocation is erroneous, the agency must adjust the amounts paid each recipient.**"
>
> GAO/OGC-92-13 *Appropriations Law* - Vol. II, Pg 7-34 (Citing: 41 Comp. Gen. 16 (1961) and B-164031(3).150, Sept 5, 1979) (emphasis added)

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[2] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (Where a statute's language is plain, there is no duty to interpret).

With respect to Requirements Payments, HAVA has clearly set a formula by which the payments are to be dispersed (see 42 U.S.C. §15402). In fact, the EAC has already determined, published and recorded an obligation for each state based upon this formula. The EAC has no authority to alter these amounts. Moreover, in the event EAC were to issue funding to any state in an amount inconsistent with HAVA's formula, the agency would be obligated to remedy its error. Ultimately, either Congress through HAVA or the EAC is the authority to determine the amount and obligate requirements payments. It cannot be both. **If HAVA serves as the authority for the amount of distribution, it must also serve as the basis of obligation. To hold otherwise would be to determine that the EAC has discretion to supersede the will of Congress in the allocation of requirements payments.**

III. Nothing in the Plain Language of 31 U.S.C. §1501 (a)(5)(A) Suggests that the Existence of Other Common Statutory Requirements Render the Provision Inapplicable. As noted above, the plain language of 31 U.S.C. §1501 (a)(5)(A) provides that grant funding is obligated by operation of law when the amounts payable are set by statutory formula. There is nothing in the plain language of 31 U.S.C. §1501 (a)(5)(A) to suggest that the existence of other common statutory requirements (such as state plans, matching funds or certifications) render the provision inapplicable.

All grants, including those where the amount to be dispersed is based on a statutory formula, must have requirements that identify qualified recipients and set an administrative process. To suggest that grant program statutes which contain requirements other than those setting payment amounts fall outside the preview of 31 U.S.C. §1501 (a)(5)(A) would render the paragraph meaningless, as no Federal grant program could meet such a requirement. Such a reading is inconsistent with the cannons of statutory interpretation.[3] Additionally, any attempt to distinguish between grant requirements, finding that some are consistent with the provision of 31 U.S.C. §1501 (a)(5)(A) and some are not, would require the navigation of a slippery slope without any standard or guidance from the statute. The plain language of 31 U.S.C. §1501 (a)(5)(A) is limited to one requirement: that the amounts payable under the grant program are set by Congress. The existence of other common grant requirements does not shift this authority. The fact that HAVA requires grantee states to make certifications, submit a state plan and set aside matching funds before they may receive Requirements Payments does not diminish EAC's obligation to the pay the states the proper amounts prescribed by law.

This reading of 31 U.S.C. §1501 (a)(5)(A) is also supported by GAO opinions. In all cases EAC has surveyed regarding the obligation of formula grants, GAO has never considered additional statutory requirements (like state plans, matching funds or certifications) relevant to their 31 U.S.C. §1501 (a)(5)(A) determination, even where such requirements clearly existed within the grant program. In fact, GAO has specifically held 31 U.S.C. §1501 (a)(5)(A) applicable to formula grant programs that had elements like matching fund certifications and state plans.

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[3] *White v. Black*, 190 F.3d 366, 368-89 (5th Cir. 1999) (It is a fundamental rule of statutory construction that a statute must be construed so as not to render any one portion meaningless).

In the seminal opinion regarding obligation under 31 U.S.C. §1501 (a)(5)(A), 63 Comp. Gen. 525, GAO found that a Department of Labor grant in which payment amounts were set by statutory formula was a formula grant within the meaning of 31 U.S.C. §1501 (a)(5)(A) and obligated by operation of law, notwithstanding the fact that disbursement of grant funds was statutorily contingent upon other factors (including state matching funds and submission of state plan). The case involved funding transferred from the defunct Comprehensive Employment and Training Act (CETA) to the Job Training Partnership Act (JTPA). CETA funds were voluntarily recouped from state grantees for redistribution under JTPA grant programs. With respect to Puerto Rico, the Secretary of Labor challenged the Governor's selection of Special Delivery Areas, a required step for receiving funds under one of JTPA's grant programs. The matter was eventually resolved in litigation. However, as a result of the dispute, all JTPA program funding was withheld from Puerto Rico and Department of Labor did not record an obligation of funding for the territory. Relying on 31 U.S.C. §1501 (a)(5)(A), GAO held that because JTPA's grant programs were to be distributed pursuant to statutory formula, they were properly obligated by operation of law, even though no obligation was recorded. Included in what GAO phrased "formulae and designations of absolute amounts payable" was JTPA's Employment and Training Assistance for Dislocated Workers (Title III, Public Law 97-300 (Oct 13, 1982)). This grant program was allotted pursuant to a formula (Public Law 97-300 §301(b)) and, similar to HAVA's Requirements Payments, required states to demonstrate that they would match Federal funding (Public Law 97-300 §304) and submit a state plan for the use of the funding (Public Law 97-300 §308) to qualify for the payments.

Another example is found in Comptroller General Opinion B-211323. In this case GAO found that grant funds may be properly distributed under a statutory formula without formal recording, even when the grant required a 25 percent match and preapproval of grant projects. The opinion involved Section 304 of the Public Works and Economic Development Act of 1965. (As amended, 42 U.S.C. §3153 (1976 and Supp. IV 1980)). "Section 304 authorizes the Secretary of Commerce, and by delegation of authority the [Economic Development Administration], to make monies available to the states to fund or supplement certain Administration projects authorized by the Act." (B-211323). GAO found that the "[f]unds for section 304 projects are apportioned to the states in accordance with the formula contained in the statute and not on approval of a state grant application." (B-211323). Thus, this grant was apportioned without any type of grant agreement or application approval upon which to base an obligation; rather, it was obligated by operation of law pursuant to 31 U.S.C. §1501 (a)(5)(A). Again, GAO made this conclusion while acknowledging that the grant's funds must be matched by a 25 percent state contribution and the state projects must be certified by the Administration as meeting all the Act's criteria. (B-211323, internal citations omitted).

The final example is found at B-164031(3).150. In this opinion GAO determined that a Federal formula grant obligated funds by operation of law, notwithstanding the statutory precondition that the state grantee submit and have approved a state plan covering 22 different requirements. Specifically, the opinion dealt with the administration of Grants to States for Medical Assistance Programs (Public Law 89-97 (July 30, 1965)). This program

required the Secretary of Health, Education and Welfare to make quarterly grant awards to states for medical assistance (Medicaid). States were entitled to funding under the program on a matching percentage basis. The Secretary would obligate funds each quarter based upon an estimate of the expected Federal share. This amount would then be amended to reflect the actual expense incurred. The issue discussed in the opinion involved an erroneous obligation estimate that was not properly amended before the end of the fiscal year. The question was whether the Secretary could provide the state the actual amount due, irrespective of the erroneously recorded obligation. GAO concluded that the Secretary's estimated obligation was irrelevant and that the obligation occurred by operation of law consistent with the statute. The Secretary was required to pay the states the percentage required by the statute. Again, GAO held that this formula grant obligated its funding by operation of law, notwithstanding the requirement that each state was require to submit and have approved a detailed "State Plan for Medical Assistance." (Public Law 89-97, Title XIX). This state plan placed 22 different requirements upon the state (Public Law 89-97, §1901(a) (1)-(22)).

In each of the above opinions, GAO held that grant programs which contained both statutory formulas for allocating funds and statutory elements similar to those of HAVA Requirements Payments (state plans, matching funds or certifications) were obligated by operation of law pursuant to 31 U.S.C. §1501 (a)(5)(A). In each case, GAO did not consider the additional statutory elements relevant to the application of 31 U.S.C. §1501 (a)(5)(A), even though they were clearly present.

IV. Federal Agencies Commonly Implement 31 U.S.C. § 1501(a)(5)(A) Based Upon a Plain Language Reading of the Provision. The above interpretation of the plain language of 31 U.S.C. § 1501(a)(5)(A) is one commonly adopted by Federal agencies. If GAO should go beyond the plain language of the statute and hold that its does not apply to formula grants which contain statutory requirements such as state plans, matching funds, and certifications, the effect would be a substantial departure from the collective understanding of the statute. Such an interpretation would reverse widespread agency treatment of formula grants.

The statutory scheme in HAVA is not unique. Congress frequently uses formulas to dictate how agencies should distribute funds to recipients. In addition, the authorizing legislation commonly requires state plans, matching funds, and other administrative requirements. Some examples include substantial grant programs administered by the Department of Health and Human Services, 42 U.S.C. § 3021 et seq.; the Department of Agriculture, 7 U.S.C. § 341 et seq. and 7 U.S.C. § 361a et seq.; the Department of Justice, 42 U.S.C. § 3796gg et seq.; the Department of Homeland Security, 6 U.S.C. § 601 et seq.; and the Department of Transportation, 49 U.S.C. § 5311 et seq.

It is EAC's understanding, through its initial inquiries on the subject, that agencies which administer grants similar to HAVA's Requirements Payments generally do so without requiring grant agreements or other formal documentation. This is done with the understanding that these grant payment are obligated by to operation of law per with the plain meaning of 31 U.S.C. § 1501(a)(5)(A).